No. SC93555

In the Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

KARTEZ HARDIN,

Appellant.

Appeal from the Circuit Court of the City of St. Louis
Twenty-second Judicial Circuit
The Honorable Angela Turner Quigless, Judge

RESPONDENT'S AMENDED SUBSTITUTE BRIEF

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ATTORNEYS FOR RESPONDENT
STATE OF MISSOURI

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STATEMENT OF FACTS

Kartez Hardin appeals the judgment entered upon a jury verdict convicting him of forcible rape, two counts of kidnapping, endangering the welfare of a child, property damage in the second degree, aggravated stalking, six counts of violation of a protective order, domestic assault in the second degree, and victim tampering (L.F. 49-62, 65-74).

The incidents.

Viewed in the light most favorable to the verdict, the following evidence was adduced at trial.

Victim began dating Appellant in February 2010 and they were married on May 19, 2010 (Tr. 197-98). On July 18, 2010, Victim saw the mother of her ex-boyfriend, Destin Joshua, at a gas station (Tr. 200). Joshua's mother asked if Victim could bring Joshua's birth certificate and GED certificate to her house, and Victim agreed (Tr. 201). The next day, Victim went to Joshua's mother's house (Tr. 201-02). As Victim was seated in her car talking to Joshua, Appellant drove around the corner in his vehicle (Tr. 205). As Victim was leaving the area, Appellant pulled in front of her and motioned for her to pull over (Tr. 205, 209-11). Appellant opened Victim's driver's side car door, took her keys out of the ignition, removed her gun from the middle console, and began hitting her (Tr. 213). Appellant hit her approximately twenty times on the side of the head and ripped off her shirt and bra (Tr. 213-14). Appellant gave her the car keys and told her to go home, stating that

he would follow her (Tr. 216). Victim drove a route away from her home in hopes of seeing a police officer, but Appellant called her on the phone, waved her gun at her, and stated that he would start shooting if she did not go home (Tr. 216-17). Victim speed-dialed her son's father and put him on speaker phone; she asked him to send the police to her house (Tr. 217-18). Victim and Appellant went in the house and Appellant pulled her hair (Tr. 218). The police arrived but Victim was afraid to say anything to them (Tr. 218-19). Appellant started to take Victim to the hospital at her request, but he stated that he intended to drop her off there, and she did not want to go to the emergency room alone, so he took her back home (Tr. 219-20).

The next day, Victim could not hear out of her left ear, and she convinced Appellant to take her to the doctor, but Appellant did so only on the condition that she tell the doctor that her ex-boyfriend had beaten her (Tr. 221). A CAT scan showed six facial fractures (Tr. 221-22). Victim eventually saw an ENT specialist and learned that her eardrum was ruptured (Tr. 225).

Victim missed work for the entire week of the incident and was fired when she returned (Tr. 225-26).

Victim's relationship with Appellant became "[v]ery volatile" (Tr. 228). Approximately two weeks before Thanksgiving, Victim told Appellant that she did not want to be with him anymore and she wanted him out of her house (Tr. 235). Victim drove Appellant to his mother's house (Tr. 235). When they got there, Appellant grabbed the keys out of Victim's ignition, got in his car, and left (Tr. 235-

36). Victim had a spare car key in her purse but did not have a spare house key (Tr. 236). Appellant called and told her to meet him in front of his aunt's house and he would give the keys back (Tr. 236). When Victim arrived, Appellant got in the backseat of her car and started hitting her (Tr. 236-37). Victim's son was in the front passenger seat (Tr. 236). Victim told her son to get out and call 911 (Tr. 237). Appellant grabbed Victim's hair and twisted her face in front of her son's face, stating that if the boy got out of the car, his mom was going to die that night (Tr. 237). Victim jumped out in front of an oncoming car; Appellant's cousin was in the car (Tr. 237). The cousin told them that the police were around the corner and that they should move (Tr. 237).

During Thanksgiving week, Victim wanted to see a friend who was visiting from out of town (Tr. 228). Appellant said that she could go visit her friend, but on Monday, Tuesday, and Wednesday night when Victim got home from work, Appellant had things for her to do because his car was broken down (Tr. 229). On Thanksgiving Day, Appellant stated that she could drop him off at his cousin's house and she could go see her friend after they went to his mother's for Thanksgiving dinner (Tr. 229). They went inside at Appellant's cousin's house, and Appellant then took Victim's car and left for four hours (Tr. 229). When Appellant returned, he was extremely intoxicated and he passed out (Tr. 229). Victim stayed until almost all of the family was gone, and they got Appellant in the car and drove home (Tr. 229). Victim was upset because she still had not visited with her friend

(Tr. 229-30). Victim asked Appellant where he had been for four hours, and he replied that it was none of her business (Tr. 230).

Victim had an appointment the next morning, November 26, 2010, to meet with a lender and a realtor to sign papers on a home that she and Appellant were purchasing together (Tr. 230-31). Appellant was not at the appointment (Tr. 230). Victim broke down and told the lender and realtor that she did not want to buy the house with Appellant (Tr. 230). Victim went to the courthouse to get a restraining order but the courthouse was closed due to the Thanksgiving holiday (Tr. 231). Victim visited with her friend from out of town (Tr. 231-32). Appellant kept calling Victim during the entire time that she was gone (Tr. 232). Victim answered the calls at first, but then stopped (Tr. 232).

When Victim arrived home late that evening, Appellant's girlfriend was leaving (Tr. 232). Appellant had lost his house key and was sitting on the front porch (Tr. 232). Appellant asked Victim to let him in the house, and she declined (Tr. 233). Victim called the police and they escorted her into the house so that she could get some clothes for her son (Tr. 233-34). Appellant called Victim later that night and told her that if she didn't come home, he would kill her (Tr. 234).

On November 27, 2010, Victim obtained an ex parte order of protection based on the incidents in the two preceding weeks (Tr. 230-31, 235, 358, 361). The police were present when the restraining order was served on Appellant, and Victim allowed him to remove his belongings from her house (Tr. 245, 358, 361). As

Appellant was walking out, he told Victim that she was going to die by the end of the week (Tr. 245-46). The court later issued a full order of protection, which was served on Appellant by certified mail (Tr. 362-63). Appellant left voice messages for Victim but they did not have any conversation between November 26 and December 4, 2010 (Tr. 237-38).

On December 4, 2010, Victim took her son to Appellant's Aunt Vickie's house to get a stye out of his eye (Tr. 238-39). Appellant arrived with a box of chocolates, three balloons, and a dozen roses (Tr. 240). Victim shook her head (Tr. 240). Yelling and screaming, Appellant beat the roses against the countertop and said, "See how she does me? She won't even give me a chance. She won't even let me talk to her" (Tr. 240). Appellant's uncle got a gun and asked Appellant to leave, so he went outside and sat on the porch of an abandoned house next door (Tr. 240). Victim got her son in the vehicle and drove away, but Appellant ran after the vehicle, grabbed the luggage rack, and hoisted himself on top of the car (Tr. 241-42). Appellant was kicking the windshield with his heels, and Victim was swerving back and forth to try to throw him off of the vehicle (Tr. 242). Appellant started kicking the driver's side door, and it popped open (Tr. 242-43). Appellant reached inside the vehicle and put his arm through the steering wheel so that Victim was not able to move it (Tr. 243). The vehicle was headed off the road onto a curb where a brick building was, so Victim slammed on the brakes; otherwise, she was going to hit the brick building (Tr. 244). Appellant broke off the turn signal, which also controlled the

lights (Tr. 244). Appellant fell off the vehicle (Tr. 328). Appellant made Victim's son get in the back seat, and made Victim get in the front passenger seat (Tr. 244-45). Appellant reached into Victim's jacket pocket and took her phone from her (Tr. 245). Appellant stated that he had told Victim that she was going to die before the end of the week, and he poked her in the side of the head so that her head hit up against the window and the door (Tr. 245). Appellant drove to the home of Victim's son's father and grandmother, but Victim convinced Appellant not to leave the boy there because no one was home (Tr. 246).

Appellant drove down the highway at a speed of 100 miles per hour (Tr. 247). Victim reached back to hold her son's hand, but Appellant grabbed her hand and told her not to hold her son's hand, and that she did not deserve to be a mother (Tr. 247). Appellant drove to his Aunt Rhonda's apartment and yelled at the boy to get out of the truck, stating that if the boy told anybody what was going on, Appellant would kill his mother (Tr. 248). Appellant left the boy screaming in the middle of the parking lot (Tr. 248-49). When Victim tried to get out to stay with her son, Appellant grabbed her and wouldn't let her open the door (Tr. 249). Whenever Victim's phone rang, Appellant told her to put it on speaker and tell the callers that everything was OK (Tr. 249). Victim kept asking to go get her son, but Appellant told her not to worry because she would never see her son again (Tr. 252).

Appellant drove to the riverfront and parked between two diesel trailers (Tr. 251). Appellant grabbed Victim's legs and genital area, and told her that if she did

not give him what he wanted, he was going to take it, and he would "whoop [her] ass" (Tr. 251-52). Appellant had Victim lay her seat back, and he performed oral sex on her and then had intercourse with her (Tr. 253). Victim allowed it to happen because she did not want to be beaten (Tr. 254). Appellant started crying and apologizing, stating that he wanted them to go home and be a family (Tr. 253). Victim dropped off Appellant at Vickie's home, and then picked up her son at Rhonda's home (Tr. 261, 284). Victim drove to the police station (Tr. 262-63).

During the morning of December 5, Appellant called Victim at 12:59, 1:15, 1:16, 1:28, 2:10, again at 2:10, 2:11, 3:10, and 3:16 (Tr. 284, 291-94). Victim did not talk to Appellant, at least on the last six calls (Tr. 293-94). Appellant left a voice mail for Victim at 8:09 a.m. (Tr. 295). Appellant also wrote four letters to Victim while he was incarcerated (Tr. 298-99, 371). Appellant included a visitor form for her to come see him (Tr. 299). Appellant stated that he loved her and that he was sorry that he hurt her, and he begged her to drop the charges (Tr. 299). Appellant made a call to his sister, requesting that the sister call Victim and ask Victim what time she would be home, if she would be willing to talk to him, and if she would drop the charges against him (Tr. 299-300).

The verdict and sentences.

Appellant moved for judgment of acquittal at the close of the State's evidence and at the close of all the evidence (Tr. 440), and the trial court denied the motions (Tr. 448).

The jury found Appellant guilty of forcible rape, two counts of kidnapping, endangering the welfare of a child, property damage in the second degree, aggravated stalking, six counts of violation of a protective order, domestic assault in the second degree, and victim tampering (L.F. 49-62).

The trial court sentenced Appellant as a prior and persistent offender to fifty years in the Missouri Department of Corrections on Count I (forcible rape) and twenty-five years each on Count II and Count III (kidnapping), all to run consecutively (L.F. 68-69). The trial court sentenced Appellant to fifteen years on Count IV (endangering the welfare of a child), one year on Count V (violation of protective order), six months in MSI on Count VI (property damage in the second degree), seven years in the Department of Corrections on Count VII (aggravated stalking), one year each on Counts VIII through XII (violation of protective order), fifteen years on Count XIII (domestic assault in the second degree), and fifteen years on Count XIV (victim tampering); each of these sentences was consecutive to the sentence on Count I (L.F. 65-72).

This appeal followed.

ARGUMENT

I. (sentence for forcible rape)

The trial court did not plainly err in sentencing Appellant as a persistent offender to fifty years of imprisonment on Count I for the unclassified felony of forcible rape, as the crime is punishable by life imprisonment or a term of years not less than five years. The sentence of fifty years is authorized by the plain language of section 566.030, RSMo Supp. 2009.

A. Preservation and the standard of review.

Appellant admits that he did not challenge the sentence on Count I before the trial court. Missouri appellate courts have found manifest injustice and granted plain-error relief when a trial court imposed a sentence that exceeded the maximum penalty permitted by law. *State v. Boesing*, 307 S.W.3d 218, 219 (Mo. App. E.D. 2010); *see also State v. Taylor*, 67 S.W.3d 713, 715-16 (Mo. App. S.D. 2002) (trial court committed plain error in imposing consecutive sentences when it could have imposed concurrent sentences).

B. Analysis.

Appellant argues that his sentence of fifty years for forcible rape is outside the range of punishment specified in section 566.030.2, RSMo Supp. 2009, which provides that:

> Forcible rape or an attempt to commit forcible rape is a felony for which the authorized term of imprisonment is life imprisonment or a term of years not less than five years, unless:
>
> (1) in the course thereof the actor inflicts serious physical injury or displays a deadly weapon or dangerous instrument in a threatening manner or deviate sexual intercourse with more than one person, in which case the authorized term of imprisonment is life imprisonment or a term of years not less than fifteen years[.]

Appellant argues that the fifty-year sentence was outside the maximum sentence authorized by law, which was life imprisonment, and a life sentence would be deemed to be a thirty-year sentence for purposes of parole eligibility. Appellant's Brief at 18; Section 558.019.4(1), RSMo Supp. 2009. Appellant asserts that this is a "simple issue" of statutory interpretation. Appellant's Brief at 14.

Case law.

Appellant cites *State v. Williams*, 828 S.W.2d 894, 902-03 (Mo. App. E.D. 1992), where the Eastern District held that the maximum sentence for forcible rape under § 566.030.2, RSMo 1986 (the same statutory language), was life imprisonment, and that a sentence of 100 years for attempted forcible rape in that case was in excess of the maximum. However, the *Williams* Court articulated no reasoning to support that result.

Without explanation, the *Williams* Court merely cited *State v. Charron*, 743 S.W.2d 436, 438 (Mo. App. E.D. 1987), and *Toney v. State*, 770 S.W.2d 411, 414 (Mo. App. E.D. 1989), as authority for its holding. In *Charron*, 743 S.W.2d at 438, the Court stated that "[t]he maximum sentence authorized for forcible rape is life imprisonment." However, in that case the defendant relied on a predecessor statute in arguing that he was wrongly convicted of a class A felony rather than a class B felony. *Id.* The Eastern District held that the defendant had relied on the wrong statute and that the sentence of life imprisonment was authorized under section 566.030.2. *Id.* Thus, the *Charron* Court's statement that the "maximum sentence authorized for forcible rape" was life imprisonment was not central to the analysis. *Id.*

In *Toney*, 770 S.W.2d at 413-14, the defendant claimed that he was charged and found guilty of rape and sodomy as class B felonies but sentenced to life imprisonment for class A felonies. The Court held that the defendant was properly sentenced as a persistent offender within the statutory range of punishment. *Id.* at 414. Further, the *Toney* Court inaccurately described section 566.030, RSMo Supp. 1980, by stating that the statute provided for a sentence "for a term of five years to life," whereas the statute provided for a sentence of life imprisonment or a term of

years not less than five years. 770 S.W.2d at 414.[1]

As *Williams* did not comport with the plain language of the statute, had no supporting analysis, and was based on authorities that were not pertinent to the issue presented, this Court should declare that *Williams* is not to be followed.

Appellant also quotes *State v. Davis*, 867 S.W.2d 539, 542 (Mo. App. W.D. 1993), for the proposition that "the unclassified felony of forcible rape is punishable by life imprisonment or a term of years not less than five years and not greater than thirty years." Appellant's Brief at 15, quoting *Davis*, 867 S.W.2d at 542. However, the quotation is taken out of context and is a reference to a prior version of section 566.030. The *Davis* Court was summarizing the 1993 amendment to section 566.030, changing the sentencing language, which had theretofore been in effect since 1980, to provide that the unclassified felony of forcible rape was punishable by life imprisonment or a term of years not less than five years and not greater than thirty years. Section 566.030, RSMo Supp. 1993. However, section 566.030 was amended

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[1] The crime of "rape" had been previously classified as a class B felony in the absence of specified aggravating circumstances making it a class A felony, section 566.030.2, RSMo 1978), but pursuant to the 1980 amendments to section 566.030, the crime of "forcible rape" was an unclassified felony for which the authorized term of imprisonment was "life imprisonment or a term of years not less than five years," in the absence of specified aggravating circumstances making it a class A felony.

again in 1994, effective January 1, 1995, to provide that the sentence was "life imprisonment or a term of years not less than ten years;" thus, the language pertaining to a sentence "not greater than thirty years" was eliminated. Section 566.030.2, RSMo Supp. 1994.

Appellant acknowledges that other cases do not give the statute the reading that Appellant proposes. In *State v. Maples*, 306 S.W.3d 153, 157 n. 4 (Mo. App. W.D. 2010), the Court stated that the statutory amendments to section 566.030, effective January 1, 1995, changed the maximum sentence amounts under the option for a term of years, but the change was not a reduction to the maximum sentence—it was an increase. The Court stated that "Instead of a maximum sentence of thirty years, as was the case for the older versions of the statutes for forcible rape and forcible sodomy, the amendments to sections 566.030 and 566.060 did not have a maximum sentence." *Id.*

Appellant dismisses the Court's statement in *Maples* as dicta. In *Maples*, the defendant relied on section 1.160, RSMo Supp. 1993, which provided that "a defendant will be sentenced according to the law in effect at the time the offense was committed unless a lesser punishment is required by a change in the law creating the offense itself." *Id.* The defendant acknowledged that at the time the offenses of forcible rape and forcible sodomy were committed (1994), the offenses were class A felonies and there was no statute of limitations. *Id.* at 156. The *Maples* Court held that the 1995 statutory amendments were not a reduction in punishment

in changing the offenses of forcible rape and forcible sodomy from class A felonies to unclassified felonies when a dangerous instrument was displayed in a threatening manner; thus, section 1.160 was inapplicable. *Id.* at 157. The Court further stated that the 1995 amendments to sections 566.030 and 566.060 were "irrelevant" to the appeal, as they were not in effect at the time the offenses occurred. *Id.* at 158. However, the Court's analysis that the amendments to sections 566.030 and 566.060 did not have a maximum sentence was important in addressing the defendant's argument in that case. *Maples* is entitled to consideration as a Missouri appellate court's soundly reasoned construction of section 566.030.

In *Thomas v. Dormire*, 923 S.W.2d 533, 534 (Mo. App. W.D. 1996), a prisoner filed a petition for writ of habeas corpus, claiming that the sentencing court was without jurisdiction to sentence him to 99 years, as a prior and persistent offender, for each of five counts of the unclassified felony of forcible rape. The Western District stated that a sentence of ninety-nine years was a "term of years not less than five years" under section 566.030.2, RSMo 1986. The Court, citing *Williams*, 828 S.W.2d at 902-03, and other cases,[2] further noted that while Thomas's sentences may not have been authorized "under court interpretations" of section 566.030.2, the

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[2] *Charron*, 743 S.W.2d 436 (Mo. App. E.D. 1987); *State v. Olds*, 831 S.W.2d 713, 721-22 (Mo. App. E.D. 1992) (*"Olds I"*); *Olds v. State*, 891 S.W.2d 486 (Mo. App. E.D. 1994) ("*Olds II*").

Court was not able to reach such issues where the sentencing defect was not so patent as to present a jurisdictional issue, and the sentencing did not present a jurisdictional issue. *Thomas*, 923 S.W.2d at 534-35. Thus, *Williams* was not dispositive in that case. *Id.*

In *Olds I*, 831 S.W.2d at 722, also cited by the Court in *Thomas*, the Eastern District held that the trial court had not erred in sentencing the defendant to sentences of 75 years each on four counts of forcible rape. In *Olds II*, 891 S.W.2d at 493, the Court granted post-conviction relief and, relying on *Davis*, 867 S.W.2d at 542, held that the defendant's sentence as a prior and persistent offender exceeded the maximum allowable sentence of 50 years. The *Thomas* Court, 923 S.W.2d at 534 n. 2, stated that the *Olds* cases demonstrated "why the sentencing defect requires analysis." However, both *Olds II* and *Davis* were based on faulty analysis. *Olds II*, 891 S.W.2d at 493, mistakenly cited *Williams*, 828 S.W.2d at 902-03, for the proposition that the maximum term that a defendant could receive for forcible rape was life imprisonment, which, for purposes of sentencing as a prior and persistent offender, equaled 50 years. *Williams*, 828 S.W.2d at 902-03, did not address prior and persistent offender sentencing and did not state that a life sentence would be considered to be 50 years.

Section 566.030, RSMo Supp. 1993, in effect at the time of *Davis*, 867 S.W.2d at 542, provided that the unclassified felony of forcible rape was punishable by life imprisonment or a term of years not less than five years and not greater than thirty

years. *Davis*, 867 S.W.2d at 543, was based on a faulty analysis by applying section 557.021.3(1)(a), RSMo, which specifically applies only to offenses defined outside of the criminal code, to consider an unclassified felony, such as forcible rape, as a class A felony. Section 558.016.7, RSMo 2000, sets forth maximum terms for persistent offenders for class A, class B, class C, and class D felonies, but does not set forth a maximum term for an unclassified felony such as forcible rape. The *Davis* Court perpetuated the error of the Court in *Westcott v. State*, 731 S.W.2d 326, 331 n. 6 (Mo. App. W.D. 1987) (followed in *Weeks v. State*, 785 S.W.2d 331, 332 (Mo. App. W.D. 1990)), concluding that forcible rape is a class A felony under section 557.021.3(1)(a) when applying the persistent offender statute. Section 558.016, RSMo 2000. Even the *Westcott* Court, 731 S.W.2d at 331 n. 6, noted that section 557.021 governs the classification of offenses outside the Missouri Penal Code. Forcible rape as defined by section 566.030 is not an offense outside the Missouri Penal Code. Because the *Davis* Court considered forcible rape to be a class A felony, it then mistakenly applied section 558.011.1(1), stating that the authorized term of imprisonment for a class A felony was "a term of years not less than ten years and not to exceed thirty years, or life imprisonment."

Further, the *Davis* Court mistakenly relied on section 558.019.4(4), which set forth the minimum prison term to be served, for the proposition that a sentence of life was calculated to be fifty years. *Davis*, 867 S.W.2d at 543. Section 558.019.4 sets forth the minimum sentence to be served before eligibility for parole, but should not

have been used to limit the maximum term of years on a persistent offender sentence.

Appellant also argues that the State has "apparently" argued for a position consistent with Appellant's in the context of a case involving a Rule 24.035 motion. Appellant's Brief at 16, citing *Vanzandt v. State*, 212 S.W.3d 228, 234-36 (Mo. App. S.D. 2007). In *Vanzandt*, the movant alleged that he had been involuntarily induced to plead guilty to statutory sodomy because the plea court and plea counsel had misinformed him that the range of punishment was "five to life" rather than an unlimited term of years. *Id.* at 234. Statutory sodomy, like forcible rape, carries a sentence of "life imprisonment or a term of years not less than five years[.]" Section 566.062, RSMo Supp. 2012. The Southern District held that the movant's argument was in error because the maximum permissible punishment for statutory sodomy is life imprisonment. However, the authority cited by the Court, *State v. Chapman*, 167 S.W.3d 759, 761 (Mo. App. E.D. 2005), stated in dicta that the maximum punishment for statutory sodomy was increased to life imprisonment in 1994.

Further, the *Vanzandt* Court held that assuming *arguendo* that section 566.062 "actually authorizes an unlimited term of years as punishment, Vanzandt received sufficient information to make an intelligent decision regarding his plea when he was told by counsel and the court that he could be sentenced to life imprisonment." *Vanzandt*, 212 S.W.3d at 235. The Court found that the movant received a sentence of fifteen years, which was "well within both the authorized range of punishment

and the range of punishment explained to him at the plea hearing." *Id.* Therefore, the Court found that the motion court's finding that the movant was not misled about the range of punishment was not clearly erroneous. *Id.*

Vanzandt is limited to its facts: a determination whether the movant's guilty plea was voluntary. *Id.* The broader issue as to what is an allowable sentence under section 566.030 or like statutes was not presented or addressed in that case, nor should it have been. *Vanzandt* is not pertinent authority for the proposition that a trial court cannot impose a fifty-year sentence for forcible rape.[3]

Application of canons of construction.

Appellant argues that the varying precedents indicate that the terms of section 566.030 are ambiguous. However, section 566.030 is not ambiguous. Section 566.030 suffered a somewhat tortured history as a result of a number of legislative revisions and the Eastern District's incorrect 1992 interpretation in *Williams*, 828 S.W.2d at 902-03. The objective of statutory interpretation is to ascertain the intent of the legislature and to give effect to that intent as it is reflected in the plain

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[3] Appellant argues that the prosecutor in the present case argued for a "maximum" sentence of life imprisonment. However, the prosecutor's argument is not binding as a construction of the statute, and the fact remains that Appellant actually received a sentence of fifty years, which was lighter than what he could have received (L.F. 68-69).

language of the statute. *State v. Lewis*, 188 S.W.3d 483, 487 (Mo. App. W.D. 2006). "Where the legislative intent is made evident by giving the language employed in the statute its plain and ordinary meaning," the reviewing court is "without authority to read into the statute an intent which is contrary thereto." *State v. Brushwood*, 171 S.W.3d 143, 147 (Mo. App. W.D. 2005). Where the statutory language is ambiguous or will lead to an illogical result, the Court looks beyond the plain and ordinary meaning of the statute. *State v. Daniel*, 103 S.W.3d 822, 826 (Mo. App. W.D. 2003). "[A]mbiguities in statutes in criminal cases must be construed against the State, but this rule of strict construction does not require that the court ignore either common sense or evident statutory purpose." *State v. Harrison*, 390 S.W.3d 927, 929 (Mo. App. S.D. 2013) (quoting *State v. Knapp*, 843 S.W.2d 345, 347 (Mo. banc 1992)). Here, the language of section 566.030 is plain and unambiguous. The statute authorizes a sentence of life imprisonment or a term of years not less than fifteen years. There is no maximum term of years expressed in the statute. Appellant's sentence of fifty years is a sentence for a term of years within the plain language of section 566.030.

Appellant, however, invokes the rule of lenity. "The rule of lenity gives a criminal defendant the benefit of a lesser penalty where a statute is ambiguous and allows for more than one interpretation." *State v. Myers*, 248 S.W.3d 19, 27 (Mo. App. E.D. 2008). This Court has held that prior to application of the rule of lenity, other canons of construction need to be applied; thus, this Court has described the

rule of lenity as a "default rule." *Turner v. State*, 245 S.W.3d 826, 828 (Mo. banc 2008). In *State v. Slavens*, 375 S.W.3d 915, 919 n. 2 (Mo. App. S.D. 2012), citing *State v. Ondo*, 232 S.W.3d 622, 628 (Mo. App. S.D. 2007), and *Fainter v. State*, 174 S.W.3d 718, 719 (Mo. App. W.D. 2005), the Court noted that some courts have "started and ended" their statutory interpretation review with the rule of lenity, without requiring that other canons of construction be applied first. This Court's precedent, as set forth in *Turner*, 245 S.W.3d at 828, should be followed, and the rule of lenity should be applied only as a "default rule" after applying other canons of construction. *Accord*, *State v. Pesce*, 325 S.W.3d 565, 575 (Mo. App. W.D. 2010). "The rule of lenity lies only when, even after seizing all sources of aid, we can no more than guess as to what our legislature intended." *Harrison*, 390 S.W.3d at 929. The rule of lenity is not applicable because section 566.030 may be given its plain language meaning, and this Court is not required to guess at what the legislature intended.

Significantly, Appellant refers to "interpretation" of the statute, Appellant's Brief at 14-15, but Appellant makes no argument as to how the language of section 566.030 may be "interpreted" to disallow a sentence of 50 years, as a sentence of 50 years is plainly a sentence for "a term of years not less than five years" as described in section 566.030. Instead, Appellant claims that the maximum sentence is life imprisonment and that a sentence of 50 years is outside the maximum.

Appellant argues that his "interpretation" of section 566.030 is supported by comparing the statute to section 571.015, RSMo 2000, which provides for a sentence of "a term of not less than three years" for armed criminal action. Section 571.015 does not provide for an alternative sentence of life imprisonment. Appellant argues that "[t]hese differing statutory provisions cannot . . . be read as providing for an identical range of punishment." Appellant's Brief at 15.

In *State v. Stoer*, 862 S.W.2d 348, 353-54 (Mo. App. S.D. 1993), the defendant, relying in part on *Williams*, 828 S.W.2d at 903, argued that a sentence of 100 years under section 571.015 exceeded the statutory maximum because it exceeded a life sentence. In rejecting the defendant's argument, the Court stated that it was not swayed by *Williams* because the armed criminal action statute was not involved in *Williams* case and the cases cited in *Williams* did not involve a 100-year sentence. *Stoer*, 862 S.W.2d at 354.

In *Thurston v. State*, 791 S.W.2d 893, 895 (Mo. App. E.D. 1990), the Court held that "[t]he absence of a stated maximum penalty [in section 571.015] merely indicates a legislative intent that a defendant convicted of that offense may be sentenced to any term of years above the minimum, including life imprisonment." In *Stoer*, 862 S.W.2d at 354, the Court quoted *State v. LaRue*, 811 S.W.2d 40, 46 (Mo. App. S.D. 1991), stating that "The absence of a stated maximum penalty for armed criminal action indicates a legislative intent that an accused convicted of such crime may be sentenced to any term of years (not fewer than three) up to life

imprisonment." The *Stoer* Court held that "As *Thurston* construes the maximum penalty under the armed criminal action statute, a sentence of one hundred years is permissible, and our holding in *LaRue* is not inconsistent with that view." 862 S.W.2d at 353-54. Thus, the armed criminal action cases lend support to the proposition that a sentence for a fifty-year term of years is permissible here.

It is true that the forcible rape statute, section 566.030, differs from the armed criminal action statute, section 571.015, in that it provides for a term of imprisonment of life imprisonment *or* a term of years not less than a prescribed number. Section 566.030 incorporates "life imprisonment" and "term of years" as two different terms. Each word in a statute must be given meaning so that it is not redundant. *State v. Harrell*, 342 S.W.3d 908, 913 n. 9 (Mo. App. S.D. 2011). The reasoning of cases such as *Thurston* and *LaRue* is germane to the extent that the legislature expressed its intent in section 566.030 that there is no maximum on the term of years. However, a "term of years" and "life imprisonment" are two different measurements with two different imports. Obviously the term of a person's life is indefinite and would not be known to the sentencing court, absent extraordinary circumstances. A term of years, in contrast, is fixed, by definition. When a court imposes a sentence of life imprisonment, it does so with the obvious intent to make a statement that the defendant deserves to be in prison for the rest of his life. Although a sentence of 100 years, for example, may appear to be impractical, it reflects a sentencing court's belief that a defendant deserves to be in

prison for longer than any realistic natural life.[4] Further, whether the defendant is sentenced to life imprisonment or a term of years makes a difference for purposes of parole. For purposes of determining the minimum prison term to be served, a sentence of life is calculated to be thirty years, but a sentence of over seventy-five years is calculated as a sentence of seventy-five years. Section 558.019.4. Thus, whether the sentence is expressed as a life sentence or a term of years has differing consequences.[5]

Applying the plain language of the statute, a sentence of fifty years is a sentence for "a term of years not less than five years." Section 566.030. The Eastern District reached a contrary result in 1992, but the holding in *Williams* did not comport with the plain language of the statute. *Williams*, 828 S.W.2d at 902-03. Because *Williams* did not comport with the plain language of the statute, had no

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[4] The record reflects that Appellant was born on April 13, 1976 (L.F. 10).

[5] Appellant apparently believes he would receive a benefit with a life sentence, which would be treated as thirty years for purposes of parole eligibility. Appellant's Brief at 18; section 558.019, RSMo Supp. 2009. Because forcible rape is a dangerous felony, section 556.061(8), RSMo Supp. 2009, Appellant would be required to serve eighty-five percent of his sentence of a term of years, or reach the age of seventy and serve at least forty percent of the sentence, whichever occurs first, before becoming eligible for parole. Section 558.019.3, RSMo Supp. 2009.

supporting analysis, and was based on faulty reliance on precedent,[6] this Court should declare that *Williams* is not to be followed. Like section 566.030, other sex offense statutes provide for an authorized term of imprisonment of "life imprisonment or a term of years not less than five years." Section 566.032, RSMo Supp. 2012 (statutory rape); section 566.060, RSMo Supp. 2012 (first degree sodomy); section 566.062, RSMo Supp. 2012 (statutory sodomy). Thus, it should be apparent that this statutory language has been relied upon for decades in many cases and that many sentences other than life sentences have been imposed for these offenses. Appellant's argument presents ambiguity because it provides no definition as to what the maximum allowable term of years would be.

Appellant does not rely on the analysis in *Davis*, 867 S.W.2d at 543, for the proposition that a sentence of a term of years is limited to thirty years for purposes of persistent offender sentencing. As previously discussed, *Davis* was based on a faulty analysis by relying on section 557.021.3(1)(a) to classify forcible rape as a class A felony for purposes of persistent offender sentencing. *Id.* Section 557.021 governs the classification of offenses outside the Missouri Penal Code, but forcible rape is defined by section 566.030 and is not an offense outside the Missouri Penal Code. Appellant's sentence of fifty years for forcible rape as a persistent offender was authorized by law.

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[6] *Charron*, 743 S.W.2d at 438; *Toney*, 770 S.W.2d at 414.

The trial court did not err in sentencing Appellant to fifty years for forcible rape. Appellant's point should be denied.

II. (double jeopardy)

The State agrees that Appellant's convictions on Counts VIII through XII (violation of a protective order) violated double jeopardy, as the proof of violation of a protective order was also necessary to establish the offense of aggravated stalking (Count VII).

A. Preservation and the standard of review.

Appellant concedes that he did not raise the double jeopardy issue at trial (L.F. 63-64). Appellant requests plain error review.

An appellate court has the discretionary authority to review for plain error affecting a defendant's substantial rights "when the court finds that manifest injustice or miscarriage of justice has resulted therefrom." Supreme Court Rule 30.20; *State v. Carney*, 195 S.W.3d 567, 570 (Mo. App. S.D. 2006). Plain error review is utilized sparingly, and a defendant seeking such review bears the burden of showing that plain error has occurred. *State v. Lloyd*, 205 S.W.3d 893, 906-07 (Mo. App. S.D. 2006). Plain error review involves a two-step process. *State v. Drudge*, 296 S.W.3d 37, 40 (Mo. App. E.D. 2009). "First, the court must determine whether the trial court committed an evident, obvious and clear error, which affected the substantial rights of the appellant." *Id.* Only if this Court identifies plain error does the Court proceed to the second step of determining whether manifest injustice or a miscarriage of justice resulted. *Id.*

Missouri courts have held that a claim of a double jeopardy violation that can be determined form the face of the record is entitled to plain error review. *State v. Smith*, 370 S.W.3d 891, 894-95 (Mo. App. E.D. 2012).

B. Analysis.

In *Smith, id.* at 895, the Eastern District found that the offense of violation of a protective order, section 455.085.2, RSMo 2000, is included in the offense of aggravated stalking, section 565.225, RSMo Supp. 2010, because proof of the same conduct is required to sustain both convictions. Here, Appellant was charged with committing aggravated stalking on or about December 5 through 21, 2010, by repeatedly calling Victim and writing her letters, which violated an existing order of protection (L.F. 11). In Counts VIII through XII, Appellant was charged with violating a protective order by either calling or writing to Victim (L.F. 12). Thus, proof of violation of a protective order was necessary to establish both convictions. The State concedes that, under the ruling of *Smith, id.*, the convictions for violation of a protective order (Counts VII through XII) violated the double jeopardy clause.

CONCLUSION

Appellant's convictions and sentences should be affirmed, except that the convictions on Counts VIII through XII (violation of a protective order) may be vacated as violative of the double jeopardy clause.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 7,465 words, excluding the cover and certification, as determined by Microsoft Word 2007 software; and

2. That a copy of this notification was sent through the eFiling system on this 14th day of October, 2013, to:

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